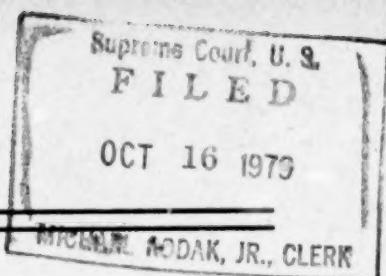


APPENDIX



In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6809

DENNIS SEAY JENKINS,

Petitioner

—v.—

CHARLES ANDERSON, Warden, State Prison for
Southern Michigan at Jackson, Michigan,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

No. 77-72690

DENNIS JENKINS, PLAINTIFF

v.

CHARLES ANDERSON, WARDEN, DEFENDANT

DOCKET ENTRIES

1977

Nov. 11 Petition for Writ of Habeas Corpus, filed. DD 11-14-77

Nov. 22 Order requiring filing of responsive pleadings by Jan 18/78. DD 11/23/77 Komives, M

Nov. 21 Attachment of Pltf for denials for Habeas Corpus with proof of service. DD 11/25/77

Dec. 21 Ptfs motion for leave to proceed forma pauperis, motion for ordering State Court Record, application for bail pending ruling on pet. for writ of Habeas corpus, affidavit, proof of service, notice of hearing set for Jan 9/78 dd 12/29/77

1978

Jan. 31 Plaintiff's motion for judgment by default with affidavit and proof of service. DD 1/31/78.

Mar. 7 Appearance of Attorney William Molner on behalf of deft. DD 3/7/78

Mar. 7 Deft's Motion for enlargement of time to answer with BA and affidavit. DD 3/7/78

Mar. 7 Deft's Answer in opposition to Motion for Bond pending Federal Habeas Corpus Review with BA. DD 3/7/78

1978

- Mar. 7 Proof of service re; Deft's Answer in opposition to Motion for Bond pending Habeas Corpus review with BA; Motion for enlargement of time to answer with BA; and Appearance. DD 3/7/78
- Mar. 15 Pltf's Demand for Judgment FRCP 54(c) (b) with proof of service. DD 3/15/78
- Mar. 16 Pltf's Motion to strike with BA and Notice of hearing set for March 27/78 with proof of service. DD 3/17/78
- Mar. 17 Order granting motion for enlargement of time for respondent's to file responsive pleadings to and including March 20/78 with certificate of service. DD 3/20/78. Komives, M.
- Mar. 20 Order denying demand for judgment, request for default and Judgment for default. DD 3/22/78 Komives M
- Mar. 20 Proof of mailing re: Order denying demand for judgment, request for default and judgment of default. DD 3/22/78
- Mar. 22 Deft's Notice of filing transcript and Motion to dismiss and alternative Motion for Summary Judgment with Affidavit and BA; proof of service, Transcript attached. DD 3/22/78
- Apr. 28 Pltf's Affidavit of Bias and/or Motion to disqualify with Notice of hearing set for May 8/78 with proof of service. DD 4/28/78
- May 11 Notice of hearing on motion to dismiss, disqualify and to strike for June 5/78. DD 5/11/78.
- May 11 Appointment of counsel for Petitioner Dennis Jenkins. DD 5/11/78. (Ziemba) Komives, M

1978

- June 5 Case called. Carl Ziemba present for petitioner. Asst. Attorney General John Mack present for respondent. Petitioner asked that his motion to disqualify and his motion to strike be withdrawn. There being no objection it was so ordered. Petitioner asked that the motion to dismiss be adjourned to June 27/78 at 10:00 A.M. There being no objection, it was so ordered. Petitioner is given leave to file an amended petition and a brief in support of his petition. DD 6/6/78. Komives, M.
- June 7 Notice of hearing on motion to dismiss for June 27/78. DD 6/8/78.
- June 7 Substitution of attorneys for respondent. DD 6/8/78.
- June 7 Proof of service on substitution of attorneys. DD 6/8/78.
- June 23 Proof of service re: Respondents Answer to Pltf's Motion for Summary Judgment w/BA and Substitution of Attorneys. DD 6/23/78
- June 23 Substitution of Attorneys for the deft: (SUB: John Mack Asst Atty General) DD 6/23/78
- June 23 Deft's Answer to Petitioner's Motion for Summary Judgment with BA. DD 6/23/78
- Aug. 16 Magistrate's report and recommendation. DD 8/17/78. Komives, M.
- Aug. 18 Petitioner's Objections to Report and Recommendations of Magistrate.
- Aug. 18 Certificate of Service re: Petitioner's Objections to Report and Recommendation of Magistrate. DD 8/21/78
- Nov. 9 Letter to Pltf re: Deft's Attorney request Pltf's Atty to bring stipulation and motions. DD 11/9/78
- Nov. 13 Order of Dismissal of action by granting Deft's Motion to dismiss. DD 11/14/78 Pratt J
- Nov. 13 JUDGMENT dismissing action. DD 11/14/78 Pratt, J (cards mailed)

1978

Nov. 13 Proof of mailing re: Order of Dismissal and Judgment. DD 11/14/78

Nov. 15 Ptfs' notice of appeal. DD 11/16/78

Nov. 15 Request for compliance with Rule 22(b). Federal Rules of Appellate Procedure. DD 11/16/78

Nov. 17 Letter to Atty re: Notice of Appeal. DD 11/20/78

Nov. 17 Proof of mailing re: Notice of Appeal. DD 11/20/78

Nov. 21 Certificate of Probable Cause with proof of mailing. DD 11/22/78 Pratt J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
Detroit

Michigan Supreme Court #58452

Court of Appeals #22715

Recorder's Court #74-06322

DENNIS JENKINS, PETITIONER

—vs.—

CHARLES ANDERSON, Warden
State Prison of Southern Michigan, RESPONDENT

DENNIS JENKINS, PROPRIA PERSONA

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Petition of DENNIS JENKINS respectfully represents:

1. That your Petitioner is now illegally imprisoned by CHARLES ANDERSON, Warden of State Prison of Southern Michigan and such prison is located within the jurisdiction of this COURT.

2. That the cause or pretense of said imprisonment, according to the best knowledge and belief of your Petitioner is, conviction of Manslaughter in Recorder's Court at Detroit on November 7, 1974, and subsequent sentence given on November 12, 1974. (SEE "Exhibit A").

3. That said imprisonment is illegal and unlawful, in that the conviction was obtained in violation of rights guaranteed Petitioner by the FIFTH, SIXTH, and FOURTEENTH AMENDMENTS of the Constitution of the United States and such violations are as follows:

(a) That the Prosecutor violated Petitioner's right of Fifth Amendment by questioning Petitioner as to why he remained silent when first arrested and why he did not tell the police the story just related to Jury and FURTHER argued in his summation to Jury that Petitioner, then defendant, should be convicted because he had remained silent when first arrested and had failed to talk to the police about the alleged crime.

(b) Petitioner was denied a fair trial and due process of law when the Prosecutor argued to the Jury that the homicide, *in his personal opinion*, was the result of a narcotic transaction; but no such logical inference could have been drawn from the evidence presented and the Prosecutor became an unsworn witness against your Petitioner who could not face and cross examine this accuser and such denied your Petitioner confrontation guaranteed by the Sixth Amendment.

(c) Petitioner was denied 'due process' of law and a fair trial when the Court refused to read, upon the request of Jury, certain testimony that went to the crux of the offense even though Jury had deliberated on November 1, 4, 6, and 7, primarily in half-day sessions and Michigan law demanded that the testimony to read upon request. Such denied Petitioner procedural due process and a fair trial in violation of the Fourteenth Amendment of the Constitution.

(d) Petitioner was denied the effective assistance of counsel in the trial court, the Court of Appeals, and the Michigan Supreme Court because court-appointed counsels never objected nor briefed any of the issues *now raised*. Petitioner, a layman at law, has never had any of the issues now being presented briefed by learned counsel merely because of poverty. Petitioner proceeded alone in the Supreme Court and that Court refused to appoint counsel to aid Petitioner and, Petitioner acting *pro pria persona*, was forced to brief said issues in both the Court of Appeals and the Michigan Supreme Court. The Michigan Constitution guarantees counsel for indigents in the appellate process but said counsel filed a pro forma brief in the Court of Appeals.

By reasons whereof, your Petitioner prays that a writ of habeas corpus may forthwith issue to inquire into the cause of his unlawful imprisonment and upon the hearing thereon, your Petitioner may be discharged therefrom by ORDER of this Honorable COURT.

DATED: November 2, 1977

Respectfully submitted

/s/ Dennis Seay Jenkins
Propria Persona

AFFIDAVIT

STATE OF MICHIGAN)
) SS.
COUNTY OF JACKSON)

On this 2-3-77, before me, the undersigned, a notary public in and for said county, personally came the above-named DENNIS JENKINS, who subscribed the foregoing petition, who being by me duly sworn says that he has read the said petition and knows the contents thereof, and that the same is true of his own personal knowledge, except as those matters therein stated to be upon his information and belief, and as to those matters he believes to be true.

/s/ Betty J. Scott
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 7-72690

DENNIS SEAY JENKINS, PETITIONER

vs.

CHARLES ANDERSON, Warden,
State Prison of Southern Michigan, RESPONDENT

MAGISTRATE'S REPORT AND
RECOMMENDATION—August 16, 1978

I. RECOMMENDATION

It is recommended that the Respondent's Motion to Dismiss be granted and that the Petitioner's Application for a Writ of Habeas Corpus be denied.

II. REPORT

Petitioner, Dennis Seay Jenkins, was convicted in the Detroit Recorder's Court of manslaughter on November 20, 1974. He was subsequently sentenced to a term of imprisonment from 10 to 15 years and is presently incarcerated under the jurisdiction of the Michigan Department of Corrections at the State Prison of Southern Michigan, Jackson, Michigan. Petitioner applied to Federal Court for relief after exhausting his state remedies.

Petitioner raises four issues. It is alleged that Petitioner was deprived of his Fifth and Fourteenth Amendment rights when the prosecutor impeached the Petitioner on cross-examination with the fact that he did not go to the police and tell the story of self defense which Petitioner gave on trial; that Petitioner was deprived of his Fourteenth Amendment right to a fair trial when the Prosecutor, in his closing argument, told the jury he

thought the situation involved grew out of "narcotics trafficking;" that Petitioner was deprived of his right to due process of the law when the trial court accepted a verdict of guilty from the jury after the trial court had stated its intention to declare a mistrial; that Petitioner was deprived of his Sixth Amendment right to effective assistance of trial and appellate counsel.

Petitioner first alleges that he was deprived of his right under the Fifth Amendment to the United States Constitution not to incriminate himself and of his right under the Fourteenth Amendment to a fair trial when the prosecution impeached the Petitioner on cross-examination with the fact that he did not go to the police and tell them the story of self-defense which Petitioner gave on trial (Petitioner's Brief, p. 7). Petitioner bases his claim on the following colloquy, which occurred after Petitioner testified that he had acted in self-defense.

"Q [By Prosecutor]: And I suppose you waited for the police to tell them what happened?

A No, I didn't.

Q You didn't?

Q I see. And how long was it after this day that you were arrested, or that you were taken into custody? (Tr. 296)

After a date was established, the prosecutor asked the following questions:

"Q [By Prosecutor] (Interposing) When was the first time you reported the things that you have told us in Court today to anybody?

A Two days after it happened.

Q And who did you report it to?

A To my probation officer.

Q Well, apart from him.

A No one.

Q Who?

A No one but my—

Q (Interposing) Did you ever go to a Police Officer or to anyone else? (Tr. 297).

A No, I didn't." (Tr. 298).

Petitioner also bases his claim on remarks the prosecutor made to the jury in his final argument, which follow:

"Now he waited two weeks, according to the testimony—at least two weeks before he did anything about surrounding himself or reporting it to anybody. And then, after two weeks, he pulled the grand stand stunt of surrendering himself to the mayor, because he claimed he was afraid." (Tr. 311)

* * * *

"I would suggest to you that he waited two weeks before he surrendered himself because he did it after he had lined up all those witnesses." (Tr. 312)
[There was an objection; overruled]

In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976), the United States Supreme Court held that the use for impeachment purposes of Petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment. The theory of the *Doyle* decision is that the *Miranda* warnings implicitly assure the arrested person that his silence will carry no penalty; and, hence, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. (426 U.S. at 618).

The Court in *Doyle* stated that, if raised, the harmless error rule may be applicable to the circumstances of the case (426 U.S. at 619-20). Federal decisions subsequent to *Doyle* have found prosecutorial comment on post-arrest silence to be harmless in several instances, especially where the comment was not prolonged or addressed in closing argument. See *Hayton v. Egeler*, 555

F.2d 599 (6th Cir. 1977); *Moore v. Cowan*, 560 F.2d 1298 (6th Cir. 1977); *Jones v. Wyrick*, 542 F.2d 1013 (8th Cir. 1976); *Meeks v. Havener*, 545 F.2d 9 (6th Cir. 1976); *Chapman v. U.S.*, 547 F.2d 1240 (5th Cir. 1977).

In the present case, the prosecutor attempted to impeach the Petitioner with evidence of pre-arrest silence. *Doyle* dealt with the issue of post-arrest, post-*Miranda* warnings silence. Construed narrowly, *Doyle* does not stand for the proposition that the use of pre-arrest silence for impeachment purposes constitutes constitutional error. A review of the case law in the area does not reveal any cases which hold that the use of pre-arrest silence for impeachment purposes is constitutional error. Also, the use of pre-arrest silence is distinguishable from the use of post-arrest silence because with pre-arrest silence, there is no reliance on the *Miranda* warnings that the silence will carry no penalty (See 426 U.S. at 618). Therefore, none of the "fundamental unfairness" found to exist in *Doyle* is present. I suggest that the use of Petitioner's pre-arrest silence to impeach his credibility did not constitute constitutional error.

Petitioner had the right to remain silent, but when he took the stand to testify, the prosecutor had the right to try to impeach his credibility. The comments regarding the Petitioner's pre-arrest silence went to the issue of his credibility in asserting self-defense. A review of the trial transcript indicates that it is over 300 pages long. In relation to the length of the trial, the prosecutor's comments regarding Petitioner's failure to report his version of the facts to anyone for over two weeks were not extensive or prolonged. Therefore, I suggest that Petitioner's first claim is without merit.

Petitioner next alleges that he was deprived of his Fourteenth Amendment right to a fair trial when the prosecutor accused him of "trafficking in narcotics" in the closing argument (Petitioner's Brief, p. 18). In argument to the jury, the prosecutor told them the following:

"Now he [Ronald Connor, prosecution witness] admitted all this. He told you that he robbed Willie

Brunner and took not only money, but some narcotics from him. Now I suggest that the testimony indicates that there was some kind of connection between Mr. Brunner and the Defendant which resulted in the Defendant going out looking later on that day for the deceased, with the intention that he had formulated in his mind that when he found him, he was going to do something about it, *and to put it very bluntly, flat out, I think this was a part and parcel of a narcotics trafficking, and it grew out of it, and was part of the circumstances that are involved in this type of traffic.*" (T306) [Emphasis added.]

The scope of review of a petition for a writ of habeas corpus by a federal court is a "narrow one of due process and not the broad exercise of supervisory power that it would possess in regard to its own trial court." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). This is important because not every trial error which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." *Donnelly, supra*, 416 U.S. at 642 citing *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Petitioner does not allege that he has been denied the benefit of a specific provision of the Bill of Rights. Instead, his claim is that the prosecutor introduced such prejudicial material into the case during the closing argument that the trial was suddenly infected with unfairness making the resulting conviction a denial of due process.

I suggest that Petitioner's claim is without merit. In *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976), the Court set forth a test to review prosecutorial misconduct:

"In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive, whether they were

deliberately or accidentally placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused."

In the present case, the prosecutor made one isolated reference to "narcotics trafficking". While the remark was capable of the inference that Petitioner was dealing in narcotics, the prosecutor did not pursue that line of argument. The remark was not totally without basis in evidence. Petitioner testified that he had previously been convicted of unlawful use of heroin. Also, a witness testified that he had robbed persons in the company of Petitioner of money and "dope." Because the prosecutor's remark was ambiguous, was an isolated reference, and there is no evidence that it was deliberate or calculated, the remark did not make Petitioner's trial so fundamentally unfair as to deny him due process.

Petitioner also alleges that he was deprived of his Fourteenth Amendment right to due process when the trial court accepted a verdict of guilty after it had declared a mistrial. (Petitioner's Brief, pp. 23-25). He bases this contention on the following colloquy:

"THE COURT: All right. Case Number 74-06322, People of the State of Michigan versus Dennis Jenkins. The record should indicate that the Jury has been deliberating since Thursday of last week— Which was?

COURT CLERK: October Thirty-First.

THE COURT: (Continuing) The Thirty-First of October. Although, the deliberations were for approximately one hour and a half that date. The Jury deliberated Friday the First of November, the Jury deliberated Monday, the Fourth of November, the Jury deliberated Wednesday, the Sixth of November, and the Jury has deliberated half a day today, the Seventh of November. The Court is of the opinion that the Jury is going to be unable to reach a decision, and is going to declare a mistrial. Counsel wants to be heard? (T364)

MR. RUTLEDGE [defendant's counsel]: No, Your Honor.

MR. WEISWASSER [prosecutor]: I think the facts are self-evident.

THE COURT: Yes, I think so. All right. The mistrial will be ordered, and Mr. Ware [court clerk] will set a new trial date. Bring the Jury out. (T 365)" (Tr. 365).

* * * *

"THE COURT: All right. Who is the Foreman of the Jury?

JUROR SEAT NO. 6: I am.

THE COURT: Stand up, please.

JUROR SEAT NO. 6: (Indicating)

THE COURT: Has the Jury reached a verdict? (T365)

JUROR SEAT NO. 6: Yes, sir, Your Honor.

THE COURT: The Jury has reached a verdict?

JUROR SEAT NO. 6: Yes, sir.

THE COURT: When did you reach your verdict?

JUROR SEAT NO. 6: Just a few minutes ago.

THE COURT: Where is Mr. Ware?

COURT CLERK: (Indicating)

THE COURT: The Jury has reached a verdict.

Take the verdict. (T366)" (Tr. 366).

It is important to note that the trial judge did not state his intention to declare a mistrial in front of the jury before they rendered their verdict. Also, there was no further deliberation after the trial judge told counsel of his intention and before the rendering of the verdict. The Constitution does not, I suggest, contain any provision forbidding a state trial court from following

the common sense approach as was done in the case at bar.

In his final argument, Petitioner alleges that he was deprived of his right under the Sixth Amendment to effective assistance of counsel at trial and on his appeal to the Michigan Court of Appeals. (Petitioner's Brief at p. 31). Specifically, Petitioner alleges that counsel at trial was ineffective because he failed to object (1) to the prosecutor's impeachment of the defendant and defense witness on their pre-trial silence; (2) to the prejudicial argument of the prosecutor that the defendant was a trafficker in narcotics; and (3) to the trial judge's taking of a verdict from the jury after the trial judge had allegedly declared a mistrial. These are the same issues raised by Petitioner in his Petition for Writ of Habeas Corpus and which I suggest are without merit.

The standard for effective assistance of counsel articulated by the Sixth Circuit and adopted by the Michigan Supreme Court (*People v. Garcia*, 398 Mich. 250, 266, 247 N.W. 2d 547 (1976)) is as follows:

"Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations." *Beasley v. United States*, 497 F.2d 687, 696 (6th Cir. 1974).

The Court went on to hold that "the assistance of counsel under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance." (491 F.2d at 696).

In the present case, it cannot be said that Petitioner did not receive "reasonably effective assistance" at his trial. The objections that defense attorney failed to raise have been found suggested be without merit. Therefore, there is no evidence of prejudice to the Petitioner by the objections not having been made. Also, Petitioner was indicted for first degree murder, but through the assistance of his counsel was able to obtain a reduced conviction of manslaughter. This is evidence that Petitioner received effective assistance of trial counsel.

Petitioner alleges that counsel on appeal was ineffective because he failed to raise the issues of 1) Petitioner's deprivation of Fifth and Fourteenth Amendment Rights because the prosecutor used Petitioner's pre-arrest silence to impeach his self-defense theory; and 2) Petitioner's deprivation of his Fourteenth Amendment Right to a fair trial because the prosecution remarked that Petitioner was involved in narcotics trafficking.

It has been held that where counsel failed to raise various points on appeal, a petitioner is entitled to relief if he had an arguable chance of success with respect to these contentions. *Thor v. U.S.*, 574 F.2d 215, 221 (5th Cir. 1978) citing *Hooks v. Roberts*, 480 F.2d 1196 (5th Cir. 1973), cert. denied 414 U.S. 1163 (1974). If it can be determined that the appeal would have been futile with respect to those errors that counsel failed to raise, then this Petitioner is not entitled to relief (574 F.2d at 222).

The issues now raised by the Petitioner have been suggested to be without merit. Therefore, Petitioner was not denied effective assistance of appellate counsel because he did not raise the issues on appeal.

I therefore recommend that Petitioner's Petition for a Writ of Habeas Corpus be denied.

Respectfully submitted,

/s/ Paul J. Komives
United States Magistrate

Dated: 8/16/78.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 7-72690

DENNIS SEAY JENKINS, PETITIONER

vs.

CHARLES ANDERSON, Warden,
State Prison of Southern Michigan, RESPONDENT

ORDER OF DISMISSAL—November 13, 1978

The Court, in accordance with 28 U.S.C. § 636(b)(1)(C), reviewed the Report and Recommendation of the Magistrate which recommended the dismissal of the plaintiff's petition and the granting of defendant's Motion to Dismiss. The plaintiff then filed timely his objections to that Report and Recommendation, by counsel and in pro per.

The Court has reviewed the files and records in this case, the briefs of counsel and the objections of the plaintiff and is satisfied that the Magistrate's analysis, reasoning and recommendation are correct. It, therefore, adopts the findings and conclusions of the Magistrate.

IT IS ORDERED that the Motion to Dismiss be and the same is hereby granted and that the Petition for Writ of Habeas Corpus be DISMISSED.

/s/ Philip Pratt
PHILIP PRATT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 7-72690

DENNIS SEAY JENKINS, PETITIONER

vs.

CHARLES ANDERSON, Warden,
State Prison of Southern Michigan, RESPONDENT

JUDGMENT

The Court having entered an Order of Dismissal on this date based upon its review of the file and records in this cause and upon the report and recommendation of the Magistrate in accordance with 28 U.S.C. § 636 (b) (1) (C) and after consideration of the objections filed by the plaintiff,

IT IS ADJUDGED that plaintiff be granted no relief and that the action be dismissed in accordance with the Order entered this date.

/s/ Philip Pratt
PHILIP PRATT
United States District Judge

Dated: November 13, 1978
Detroit, Michigan

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-1011

DENNIS SEAY JENKINS, PETITIONER-APPELLANT

v.

CHARLES ANDERSON, Warden, RESPONDENT-APPELLEE

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge.

ORDER—Filed May 4, 1979

Petitioner Dennis Seay Jenkins was convicted in the Recorder's Court of Detroit, Michigan, of manslaughter in the death of one Doyle Redding on August 13, 1974. Having exhausted his state remedies, he filed a petition for writ of habeas corpus in the district court, and having been denied relief there, appeals.

As grounds for relief, Jenkins asserts four alleged deprivations of his rights under the United States Constitution:

1. that he was deprived of his right under the Fifth and Fourteenth Amendments to a fair trial when the prosecutor cross-examined him and the witnesses testifying in his behalf by asking why they did not go to the police and tell them the story of self-defense which they gave at trial;
2. that he was deprived of a fair trial under the Fourteenth Amendment when the prosecutor accused him of "trafficking" in narcotics;
3. that he was deprived of his right under the Fourteenth Amendment when the trial court accepted a verdict of guilty after purportedly declaring a mistrial, and

4. that he was deprived of his right under the Sixth and Fourteenth Amendments of the United States Constitution to the effective assistance of counsel on trial and on his appeal of right to the Michigan Court of Appeals.

Upon a review of the record, the court is satisfied that none of the contentions has merit.

The most serious issue raised by petitioner is whether cross-examination as to his original silence concerning the defense amounts to a violation of his privilege against self-incrimination as construed in *Doyle v. Ohio*, 426 U.S. 610 (1976). It appears, however, that unlike the circumstances in *Doyle*, the petitioner was not questioned concerning his silence while under arrest or otherwise in custody. The petitioner does not complain that his silence was the product of the implicit assurance of *Miranda* warnings that silence carries no penalty. *Doyle*, *supra*, 426 U.S. at 618. We find such a claim foreclosed by our decision in *Bradley v. Jago*, No. 78-3236, decided and filed March 27, 1979. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-1011

DENNIS SEAY JENKINS, PETITIONER-APPELLANT

v.

CHARLES ANDERSON, Warden, RESPONDENT-APPELLEE

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge

ORDER—Filed May 29, 1979

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the petitioner-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that no issues are raised which have not been previously considered by this court. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

[79] EXCERPTS FROM STATE TRIAL
TRANSCRIPT
PROSECUTOR'S OPENING STATEMENT

MR. WEISWASSER: Thank you, Your Honor.

Ladies and gentlemen, the testimony that you are going to hear for the Prosecution in this case will substantially be as follows.

On August the Thirteenth of this year, at about two o'clock in the afternoon, at an address of 7836 East Forest, at a place known as the Big D Party Store, the Defendant laid in wait with the premeditated intention to kill and murder the deceased, Doyle Redding. Doyle Redding was in that store. When he walked out of that store, the Defendant stabbed him in the chest once and the knife penetrated his heart and he subsequently died shortly thereafter from the wound.

We will prove to you, beyond a reasonable doubt, that this was a First Degree Murder, premeditatedly, and as I say, laying in wait with the intention of killing the deceased.

Thank you.

MR. RUTLEDGE: Defense will reserve their opening statement, Your Honor.

THE COURT: All right. The opening statement of the Defendant is reserved.

You may call your first witness.

* * * *

[225] REDIRECT EXAMINATION

BY MR. WEISWASSER:

Q. Then, I am to understand nothing was taken from the Defendant Dennis Jenkins?

A. No.

MR. WEISWASSER: No further questions.

THE COURT: All right.

Stand down, sir.

(Whereupon the Witness was excused from the Witness Stand.)

THE COURT: Call your next Witness.
MR. WEISWASSER: People rest, Your Honor.
THE COURT: Defense.

DEFENSE COUNSEL'S OPENING STATEMENT

MR. RUTLEDGE: At this time, Your Honor, I will make my Opening Statement.

THE COURT: All right. Proceed.

MR. RUTLEDGE: Ladies and gentlemen of the Jury, now comes the time for the Defense to present their case and this is the time you recall I reserved my Opening Statement until after the Prosecution had presented their case. And at this time, I would like to make an Opening Statement so as to give you a preview of the testimony which the Defense will be presenting.

The Defense will be presenting this [226] testimony to prove that the stabbing didn't occur in the manner as described by the Prosecution's Witnesses. We will show that the stabbing was done in self-defense. That Dennis Jenkins was not the aggressor in the conflict that occurred on August Thirteenth, 1974, in front of the Big D Party Store.

That he acted in good faith, under a reasonable belief that he was—that he was in danger of his life, or serious bodily injury. And, that he had no ability to retreat.

We will present witnesses who were there at that time, whose testimony will establish that there was a struggle between the deceased and the Defendant. I will not go into the specifics of their testimony. I will allow you to determine what they say from there, the Witness Stand.

Defense will also present Witnesses whose testimony will establish that it is doubtful that the stabbing could have occurred in the manner described by the Prosecution Witnesses.

And, after all the Witnesses have testified for the Defense, and at the end of this case, I will come to you and make a Closing, and ask that you return a verdict of Not Guilty by reason of self-defense.

THE COURT: Call your Witness.

MR. RUTLEDGE: Defense would like to call * * *

* * * *

[282] DENNIS SEAY JENKINS

The Defendant herein, was thereupon called to the Witness Stand in his own behalf, and after being first duly sworn by the Court Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. RUTLEDGE:

Q. Okay. Would you state your name for the record, sir?

A. Dennis Seay Jenkins.

Q. And how old are you, Mr. Jenkins?

A. Twenty-three.

Q. Where do you live?

A. 3824 Maistique.

Q. And with whom and how long have you been living there?

A. About eighteen months.

Q. And with whom did you live with?

A. My mother and father.

Q. And where are you employed?

A. In my uncle's store.

Q. Where is that store located?

A. 7631 East Warren.

Q. Have you ever worked anywhere else?

A. Michigan Bell.

Q. Are you married or single?

A. Single.

[283] Q. Directing your attention to August Twelfth, 1974, did you have occasion to be in the area of Forest and Van Dyke?

A. Yes.

Q. And what were you doing there?

A. First—first, we was on Seyburn, over to my auntie's house. From leaving—

Q. (Interposing) Who is "we"?

A. Me, my sister, my girl friend, and her boy friend.

Q. And can you state the name of those people?

A. Willie, PeeWee, and Alberta.

Q. Can you give the first name and last name?

A. Oh. First is Cecelia Jenkins. That is my sister.

Willie Brunner. That is her boy friend. And Alberta Green. That is my girl friend.

Q. All right. Okay.

Did anything occur while you were over to your aunt's house?

A. She wasn't there. So we usually go—usually go over there to play keno. And she wasn't there. So we left. And on my way back home, we was standing on the corner of Forest and Van Dyke, waiting on a cab, trying to decide whether we was going to go over to Alberta's house, or whether they were going to go home. So, we—well, really, we didn't decide. So I started walking because I said, "I am going to go over [284] to her house and I will call you when I get over there."

And they was waiting on the cab. By the time I get down to Forest and—well, it is another little short street in there, after you cross Warren—before you get to it. And I heard my sister and Willie down there hollering. And he was running down the street. And he told me, he said, "Man, the guy that I gave that match to just came up here and stuck us up."

I said, "Where did they go?"

He said, "They ran around the corner."

I said, "Let's stop—

Q. (Interposing) Go ahead.

A. I said, "Let's stop the Police."

So we goes back down to the corner and stand across the street. It is a church on the corner. And while we was standing on the corner, we could see the apartment building. And it was a light on in the kitchen. And we see the guys come in the door and cut the kitchen light off. So we stopped the Police and the Police tell us to get in the car. So we get in the car and give them our names and everything. And I showed them where the

guys had ran in the apartment building at. And I told them, I said, "Man, like they got guns, you know."

He said, "That is all right. I was a [285] Green Beret for three years."

So he told us to go ahead on, that he would contact us.

Q. All right. You mentioned something about the guy giving you a match?

A. No. He didn't give me a match, no.

Q. To whom did he give a match?

A. No. No. He got one from Billy.

Q. Were you there at that time?

A. Yes.

Q. Is that the same person who came back and robbed Billy?

A. That is one of—What Billy said, "The tall guy, the one I gave the match, came back and stuck us up." He said the little short guy had put the gun on him while PeeWee was across the street. And he said, "They took my money," you know.

Q. Directing your attention to the next day, August Thirteenth, 1974, were you in the area of Forest and Van Dyke?

A. Yes.

Q. Were you coming—Where were you coming from?

A. Coming from home.

Q. Where were you going?

A. I was going back over Miss Bea's.

Q. Mrs. Bee?

A. Mrs. Bea. I call her my auntie. She is been knowing me since [286] she was—I was—I was a baby. Her name is Miss Beatrice Bryant.

Q. Where does she live?

A. 4525 Seyburn.

Q. Were you alone or with someone?

A. By myself.

Q. Tell the Jury what happened on your way from your mother's house or to Miss Bea's house?

A. Well, I got off the bus and on my way, going over to her house, as I was coming—

Q. (Interposing) Off of what bus, sir?

A. Off the Van Dyke Bus.

As I was coming past the store, I don't know if you say I ran into him or what, but when he was coming out, and I am across, and he see's me, and he tells me, he say, "Man, what you doing following me?" I told him, "No, I am not following you."

He said, "Don't you know I will—I will fuck you up?"

I say, "Naw, man. I am not following you, man."

He say, "My man told me that you the one stopped the Police."

I said, "No, I didn't stop the Police."

[287] So I am afraid—I am trying to figure out what is he fixing to do. I am afraid to run, because I think he might shoot me in my back if I just take off running.

So—

Q. (Interposing) So, what happened after these initial words?

A. So he tells me, "What you think I am going to do, just—just let you go?"

I say, "No, man. I am not trying to do nothing to you."

He said, "You think you going to send the Police back around here, don't you?"

So I am trying to convince him that I am not going to send no Police around there to him or nothing.

Q. What happened?

A. So, he—he came at me with the knife.

Q. How did he come at you with the knife?

A. Like this (indicating).

Q. What did you do?

A. When he—when he came out at me with the knife, like I was—I was standing outside the doorway. And he was—he was in the little area or vestibule, or whatever you want to call it, and when he came at me with the knife, I caught his hand and tried to throw him through the window as hard as I could. And I pushed him up against the railing of the door. And I turned [288] around and started running.

Q. Okay.

Why did you grab his hand?

A. Because he was coming at me with a knife.

Q. Have you ever been arrested and convicted of a felony?

A. Yes.

Q. What is that, sir?

A. Attempted B and E.

Q. Anything else?

A. No.

MR. RUTLEDGE: Your Witness.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. WEISWASSER:

Q. How about Unlawful Use of Heroin back in 1972. Were you ever arrested and convicted for that?

A. Oh. Yes.

Q. You forgot about that?

A. (No response.)

Q. Now, were you robbed in any way on that robbery that you were telling us about that occurred the night before that stabbing?

A. No.

Q. What was your relationship to Mr. Brunner?

A. (No response.)

[289] Q. What was your relationship?

A. My relationship?

Q. What was your relationship with Mr. Brunner?

A. He was my sister's boy friend.

Q. Did you work for him in any kind of a way?

A. No.

Q. Never had any kind of connections?

A. Connections?

Q. A business connection?

A. Oh, no. No.

Q. And when he was robbed, how far away were you from him?

A. I was down past Warren. It is another little street in there but I can't think of it. I can't think of the little street. But about a block, a good block.

Q. How did you know who robbed him?

A. When he came back—when we went back down there, he told me, he say, "The guy that I gave the match, man, the two guys that came up to the corner, just stuck me up."

Q. I see.

Did you see the man he gave the match to?

A. Yes.

Q. For how long?

A. Oh, we was standing there trying to catch a cab and they walked up to the corner. First it was three of them.

[290] Q. Uh-huh?

A. Uh-huh. I guess the other guy was just with them and he just kept on going. But while he was standing on the corner, they walked up there and got a match from Billy, and we trying to decide whether we all going to go together or split up, or what.

So they messing around and acting like they didn't know what they wanted to do. So we—me and Alberta start walking down the street.

Q. So the question I asked was how long did you have occasion to look at the face of the men that asked your brother for a match?

A. Oh. About a minute or so, it might have been.

Q. Just a minute or so.

What was the man's name; do you know?

A. I know now.

Q. You know now. You do.

What was his name?

A. His name is Redding.

Q. You are sure?

A. This was the man—This is the man—This is the man that this is all about.

Q. It couldn't have been a fellow by the name of Ronald Conners?

A. Ronald Conners was the little short guy.

[291] Q. You know him, too?

A. I have been in Court every day.

Q. I see. Ronald Conners was also there, wasn't he?

A. Right.

- Q. He was—Wasn't he there as part of the hold up?
 A. I wouldn't know nothing about the hold up.
 Q. Who was the one that asked for the match, Ronald Conners or Mr. Redding?
 A. The tall guy had.
 Q. On the next day, on the basis—You saw him the next day, and you recognized him that day as being the man who had asked for the match the night before?
 A. Billy say the two guys that asked us for the match are the ones that stuck us up.
 Q. I see. And you recognized them the next day?
 A. Yes.
 Q. About how much later?
 A. Well—
 Q. (Interposing) About how much later, I am asking, from that moment that you looked at him when he asked for the match was it?
 A. Well, it wasn't even—it wasn't even twelve hours had past.
 Q. I see.
 Did you ever see the man from before?
 [292] A. No.
 Q. You never saw him from before?
 A. (No response.)
 Q. You never knew Mr. Redding?
 A. No.
 Q. And as far as I understand, was it just a coincidence that you happened to be at the store when he was walking out?
 A. Yeah.
 Q. Now were you going in the store by buy anything?
 A. No, I was going by the store.
 Q. You were walking by?
 A. Yes.
 Q. How many times did you walk by that store?
 A. Once.
 Q. You didn't walk by and then walk by again and then look through the window?
 A. No.
 Q. You didn't walk back and forth?
 A. No.

- Q. Did you look into the windows of the store at all?
 A. Not really.
 Q. There are windows on the store, plate glass windows, aren't they?
 A. Really, I wasn't paying any attention to looking in the [293] windows.
 Q. Uh-huh.
 A. I was more so concerned about what he was doing. And I know I had just got stuck up around there, or they just had got stuck up around there.
 Q. How long—
 A. (Interposing) And, we had sent the Police around.
 Q. How long—
 A. (Interposing) How many?
 Q. How long before?
 A. Like I say, it was less than twelve, sixteen hours before then.
 Q. You were still afraid after twelve or sixteen hours later and you walked around in broad open daylight there?
 A. I didn't think I would ever see them again.
 Q. See who again?
 A. I didn't think about seeing him again.
 Q. Were you afraid when you saw him?
 A. Wouldn't you be?
 Q. Were you afraid?
 A. Yes, I was.
 Q. Why didn't you run; why did you just stand there?
 A. I was afraid that he would shoot me in my back.
 Q. Were you afraid because he had a gun in his hand?
 A. Well, the night before—
 [294] Q. (Interposing) Just answer my question. Did he have a gun in his hand?
 A. I didn't get a chance to see.
 Q. Why were you afraid of what he didn't have in his hand?
 MR. RUTLEDGE: I will object. He is arguing with the Witness.

THE COURT: No, that is proper Cross Examination.
Overruled.

Q. (By Mr. Weiswasser) Did he have anything in his hands?

A. I can't remember. I was too afraid.

Q. Do you remember if he had a package that he was carrying?

A. I was too afraid of what he might do to me.

Q. I show you People's Exhibit Number Two, which is a photograph of that store.

(Indicating)

Where were you when you first saw this man?

A. I was coming this way (indicating).

Q. You were coming this way (indicating).

A. Right.

Q. And where was he when you first saw him?

A. When I first saw him, he was coming out the door.

Q. He was stepping out the door and you were over here (indicating)?

[295] A. I was about right up against this, like our eyes met.

Q. And you never looked in there first?

A. No.

Q. You didn't look inside the window and kind of smile and walk away?

A. Uh-huh.

Q. Uh-huh.

Did you ever see him with a knife in his hand?

A. Yes. When he came at me.

Q. I see.

Isn't it true that the only time you saw a knife in his hand is when he pulled it out of his chest out in the street?

A. No, it is not.

Q. And you never saw that knife before, did you?

A. No, I haven't.

Q. The one that was introduced in evidence?

A. No.

Q. Never had?

A. No.

Q. All you were doing was defending yourself, in other words?

A. That is right.

Q. Is that right?

[296] A. Yes, sir.

Q. Against a man that came out of door with a knife in his hand?

A. Right.

Q. And I suppose you waited for the Police to tell them what happened?

A. No, I didn't.

Q. You didn't?

A. No.

Q. I see.

And how long was it after this day that you were arrested, or that you were taken into custody?

MR. RUTLEDGE: I object, Your Honor.

I would like to know the relevancy. I don't think that that question is really relevant.

THE COURT: It could be.

Overrule the objection.

We will take the answer.

Q. (By Mr. Weiswasser) How long after August the Thirteenth, was it that you were taken into custody?

A. I guess it was a little over a week. Me and my mother and my uncle—

Q. (Interposing) You are sure it was a little over a week?

A. Yes, or ten days, twelve days.

[297] Q. Could it have been over two weeks?

A. I am not real sure.

Q. Could it have been August Twenty-Ninth, two weeks and a day later?

A. No. I remember exactly what day it was that I came down.

Q. Well you have been here throughout the course of this trial, have you not?

A. Right.

Q. Did you hear the Detective testify yesterday that you were taken into custody on August the Twenty-Ninth?

A. I don't think it was August the Twenty-Ninth.

Q. You don't.

A. No, because I wasn't taken into custody, like, that—

Q. (Interposing) When was the first time that you reported the things that you have told us in Court today to anybody?

A. Two days after it happened.

Q. And who did you report it to?

A. To my probation officer.

Q. Well, apart from him?

A. No one.

Q. Who?

A. No one but my—

Q. (Interposing) Did you ever go to a Police Officer or to anyone else?

[298] A. No, I didn't.

Q. As a matter of fact, it was two weeks later, wasn't it?

A. Yes.

Q. And now, do you remember Mr. Redding throwing a bottle at you?

A. Not really.

Q. Not really.

He never did, after you stabbed him?

A. Listen. You want to know the truth? I was so afraid, I didn't think about turning around to look to see what was happening.

Q. As a matter of fact, you were so afraid when you first saw him that you stabbed him, isn't that right?

A. No, that is not right.

Q. That is not right.

As a matter of fact, isn't it true that you were in front of that store because you were looking for him and to get even with him for what he had done to Mr. Brunner the night before, at least, according to your idea?

A. No.

Q. Isn't that true?

A. No, it is not.

Q. Weren't you walking up and down looking for him?

A. No, I wasn't.

[299] Q. And waiting for him to come out the store to stab him?

A. No, I wasn't.

Q. Now, in what hand did the deceased have the package he was carrying?

A. I—I was—I don't remember no package. I was—

Q. (Interposing) Where did—What hand did—Where did he take the knife from?

A. I caught his right hand.

Q. Uh-huh.

And did he drop anything he was holding in his hands at the time?

A. I don't remember.

Q. Did he walk out of the store with a knife in his hand, or did he take it out of a pocket?

A. When I tried to push him as hard as I could—

Q. (Interposing) I asked—

Just answer the question that I asked you.

Did he take the knife out of his pocket?

A. I do not remember.

Q. (Interposing) I asked—

Q. Or, did he have it in his hand when he came out the store?

A. I do not remember that. I am trying to figure out what did this.

Q. Show us how he held that knife.

Q. I don't know—

[300] Q. (Interposing) Did he stop and go like this (indicating); and open it up and then stab you, and you were standing there waiting to be stabbed; is that what you are telling us?

A. When we were standing there—

Q. (Interposing) Just answer my question.

Is that what you are telling us?

A. Telling—Repeat the question.

Q. You waited to see him pull it open and open it up and make a dagger out of it, and waited for him to stab you; is that what you are telling us?

A. When he came out—

MR. RUTLEDGE: (Interposing) That question is so long, how can it be answered?

THE COURT: Just a minute, sir.

MR. RUTLEDGE: How could he answer a question when he has compounded the question three or four times?

THE COURT: No, I don't think that question is so complicated.

I will take the answer.

Q. (By Mr. Weiswasser) You were waiting there for him to open up the knife, pull it out, and make a dagger out of it, and you were standing there for him to stab you; is that what you are telling us?

[301] A. No. I am telling you that when he came at me with that knife, I tried as hard as I could, to—

Q. (Interposing) "to", what?

A. To push that knife in him as far as I could.

Q. I agree with you, sir.

But, at the time you were trying to push that knife in him as far as you could, that knife happened to be in your hand, wasn't it?

A. No, it wasn't.

Q. He just came out of the store carrying a package that you don't remember—

A. (Interposing) No, he came—

Q. (Continuing)—and then he opened the knife and he had to take it out and open it up and make a knife with it, he did all this and you stayed there because you were—

MR. RUTLEDGE: (Interposing) Objection, Your Honor.

Q. (By Mr. Weiswasser) (Continuing)—afraid of him?

MR. RUTLEDGE: The Prosecutor hasn't asked a question. He is arguing to the Jury.

THE COURT: I sustain that objection.

MR. WEISWASSER: I have no further questions of the Witness.

THE COURT: Redirect?

[302] REDIRECT EXAMINATION

BY MR. RUTLEDGE:

Q. How did you arrest come about, Dennis?

A. Me and my mother and my uncle, we talked to Coleman Young the night before the twenty-seventh, and I went down and turned myself in. Me and him and his bodyguard came over to Recorder's Court and went in front of Judge Crockett.

Q. Okay.

Did you stab Redding—Once again, what is the reason that you stabbed Redding?

THE COURT: Counsel, is it necessary for you to repeat that?

A. I was afraid.

THE COURT: Just a minute.

It is on the record several times. Do you want to keep going over it?

MR. RUTLEDGE: Well, I believe the Prosecutor has made—

THE COURT: (Interposing) I think there is no need to cover it again. You have covered it on your Direct.

MR. RUTLEDGE: No other questions.

THE COURT: Anything else of this Witness?

[303] MR. WEISWASSER: Just one question.

RECROSS EXAMINATION

BY MR. WEISWASSER:

Q. Was there any special reason why you went over to the Mayor's Bodyguard and to the Mayor and everything else to surrender yourself instead of going to the Police the same day when this happened, instead of waiting two weeks to go to the Mayor?

A. Yes, it is.

Q. What is the reason?

A. Because I was afraid. Judge Gardner just had gave me probation.

Q. You were afraid of whom?

A. I was afraid what I had happened.

Q. But you hadn't done anything. You were just defending yourself.

A. But, I don't know anything about the law.

MR. RUTLEDGE: Your Honor, I object. He is arguing with the Witness.

THE COURT: Sustain that objection.

MR. WEISWASSER: I have no further questions.

THE COURT: Anything else?

MR. RUTLEDGE: Defense rests.

[304] THE COURT: Thank you, sir. You may stand down.

(Whereupon the Witness was excused from the Witness Stand.)

THE COURT: Any rebuttal?

MR. WEISWASSER: People have no rebuttal.

THE COURT: All right.

The next step in these proceedings, ladies and gentlemen, will be closing arguments. And then, we will have the instructions to the Jury.

We will take the closing arguments after a short recess, and then I will instruct you on the law.

We are making plans for your dinner if we find it is necessary.

Step into the Jury Room.

(Whereupon the Jury was excused from the Court-room.)

THE COURT: Counsel, let me see you back in chambers.

(Whereupon a recess was taken; pursuant thereto, the matter was resumed.)

THE COURT: Mr. Weiswasser, are you ready?

MR. WEISWASSER: Yes, Your Honor.

[305] THE COURT: Defense Counsel?

MR. RUTLEDGE: Yes, Your Honor.

THE COURT: All right.

Bring the Jury out.

(Whereupon the Jury was summoned to the Court-room and seated.)

THE COURT: Will the parties stipulate that the Jury is present and properly seated?

MR. WEISWASSER: People so stipulate.

MR. RUTLEDGE: Defense so stipulates.

THE COURT: All right.

You may proceed with your closing arguments.

PROSECUTOR'S SUMMATION

MR. WEISWASSER: Thank you, Your Honor.

Ladies and Gentlemen, the testimony in this case didn't take too long. I don't see much sense in going over it bit by bit, detail by detail. You heard it. You saw the Witnesses. You had a full opportunity to observe them and listen to them. So, I am not going to extend a lot of time going over it bit by bit, all of the morbid details. I am simply going to touch on what I consider to be some of the highlights. And, I am going to mention a Witness that you saw but did not hear.

It is the theory of the Prosecution in [306] this case that the Defendant went out looking for the deceased, and when he found him, he laid in wait for him to come out so that he could kill him. And I think that the reason—the motivation is something which you heard of in the testimony. You heard the testimony of the Witness Ronald Conner, who admitted that he had committed a Robbery Armed on the—some man, with the Defendant about a half a block away, he says, and somebody else says he was a block and a half away. I think Mister—the man who was robbed himself, Willie Brunner said he was a block and a half away at the time that Willie Brunner was robbed.

Now he admitted all this. He told you that he robbed Willie Brunner and took not only money, but some narcotics from him. Now I suggest that the testimony indicates that there was some kind of connection between

Mr. Brunner and the Defendant which resulted in the Defendant going out looking later on that day for the deceased, with the intention that he had formulated in his mind that when he found him, he was going to do something about it, and to put it very bluntly, flat out, I think this was a part and parcel of a narcotics trafficking, and it grew out of it, and was part of the circumstances that are involved in this type of traffic.

You know, the Witnesses in this case that [307] you heard, Ronald Conners, first, and I told you, he is admittedly a friend of the deceased, of Doyle Redding, admittedly, he committed a Robbery Armed—stole some narcotics and some money from Mr. Brunner. And you might thing that his testimony—there is a question as to how much credit you can give to it, and how much you can believe from everything that he said, from what he saw from the upstairs window. But, every single thing that he told you that he saw was corroborated by Mr. Gaines, the clerk in the party store.

MR. RUTLEDGE: I would object to that, Your Honor.

I hate to interrupt the Prosecutor in his closing. But I think he is misquoting the testimony.

THE COURT: The Prosecutor, along with yourself, counsel, can make comments about the testimony. If they are incorrect in their comments about the testimony, that is for the Jury's determination.

You may proceed.

MR. WEISWASSER: All right.

You heard the testimony of both Ronald Conners and Robert Gaines. And I state to you that what you heard was Mr. Gaines in every significant detail corroborated what Ronald Conners told you that he saw from [308] the upstairs window, and that he made a statement of to the Police, if you will remember, fifteen, twenty minutes after the crime had occurred. And the Police Officer came and he told him what he had saw—what he had seen. And the Police Officer wrote it down. And everything that Mr. Conners stated on the Witness Stand was corroborated by Mr. Gaines in every significant detail.

Mr. Gaines was a distinterested Witness. He didn't know either party. His only connection—his connection with them was he knew Doyle Redding, the deceased, as a customer who came in there and bought things. He knew the Defendant as a person he had seen on the street. There is no reason for him to lie. There was no reason for him to do anything but simply tell you what he saw. He told you. And his testimony is, at least, partially corroborated by his aunt that didn't see the face of the individual, because the deceased's body blocked her view. But she did see a fragmentary smile on the face of the person that assaulted the deceased. And she what happened. And you heard what she testified to. There was an action at the door and the man staggered back and it all happened in just a moment. No struggle. No five, ten minutes out in front. No lengthy struggle. The whole thing just took—(indicating)—less than a minute. There was an immediate action. There were no [309] words spoken.

The testimony of Mr. Gaines was that he saw the Defendant walk by the store twice. He saw him looking in the window. He saw him waiting in front of the store. He saw him with his hands behind his back. To me, that means he was holding that knife with the blade open behind his back after he spotted the deceased inside the store through the windows of that store. He testified that the deceased, Redding, exited with a package in his hand. He testified that he saw the deceased pull the knife out of his chest and run after the Defendant.

Now if anyone did see the deceased out on the street with a knife in his hand, it was after he had pulled the knife out of his chest that the Defendant had put there. But, in questioning the Witnesses—and, I know you heard some Witnesses here that I would submit their credibility is for you to consider—and they don't even remember whether it happened around noon or two o'clock, or—and the discrepancy between a time of two hours, and the things that they saw, the record indicates how reliable they are, and much credit you can attach to the things that they said. But we will talk about that later.

But, you see, there is a silent Witness in this case. Like I told you, a Witness that you saw, and as [310] you can see, again, a Witness who cannot lie. A Witness who speaks—that speaks with a mute tongue, only because of what it is, and how it operates. Remember that Mr. Gaines said that the deceased exited the store with a package in his hand, that there is testimony that it was thrown at the Defendant. After the deceased was stabbed with a knife, he chased the Defendant and threw the package at him. This is the silent Witness (indicating). With a package in his hand, how could Doyle Redding have taken this knife and opened it?

(Indicating) To get this guard that is used to cover it into a dagger with a package in his hand? This is not a switch blade. It takes two hands to open it. How could he have done it with a package in his hand the way the Defendant tells you that it happened? How could he possibly have done it?

You know, you can take that knife in that Jury Room when you go in there to deliberate. You can test it. You can try to open it. See how easily it opens. Just try to open it yourself. You can even try to open it with something else in your hand and see if you can open it when you are in that Jury Room considering the testimony in this case and the decision that you have to reach.

And, if you have any doubts, reasonable doubts, that are so much hounded at you by Defense Counsel, [311] just remember that silent Witness who cannot lie.

There is another few points I think I'll touch upon. Remember this, too. The testimony of the Defendant when he was on the Witness Stand, when he said—and I wrote down the words that he said—"I tried to stab him as hard as I could." Of course, he presented it to you on the basis of pushing it and somehow or another the knife got into his chest. And he was defending himself. There was kind of an idea that it was an accident, or in defense of himself. But he pushed it as hard as he could into the man's chest. That is the Defendant's own testimony when he was on the Witness Stand.

Somehow or another, I do not see an accident there, or I do not see self-defense. Not when you consider how

that knife got into the Defendant's hand, and what must have been done to make it work so that you can stab and kill somebody.

Now he waited two weeks, according to the testimony—at least two weeks before he did anything about surrendering himself or reporting it to anybody. And then, after two weeks, he pulled the grand stand stunt of surrendering himself to the Mayor, because he claimed he was afraid. Of course he wasn't afraid during the two weeks, but after two weeks, he decided he was going to be afraid and he [312] was going to surrender himself to the Mayor. I don't know what he really was afraid about. But he didn't make that very clear. He was afraid because of something that he had done. And, it might be something that might militate against his own interest. I would suggest to you that he waited two weeks before he surrendered himself because he did it after he had lined up all those witnesses.

MR. RUTLEDGE: I would object to that, Your Honor. I think that is an improper inference from the testimony that has been adduced from this trial.

THE COURT: This is closing arguments. We will allow that.

MR. WEISWASSER: I suggest that he surrendered himself after he had those two Witnesses to line up all of those Witnesses that you heard testify. And the most that anyone of them really said that really amounted to anything that you can believe is that they did see Doyle Redding, the deceased, with a knife in his hand. Which they probably did. Sure they did see it. No question about it. After he pulled it out of his own chest, after the Defendant had put it there. And he pulled it out of his chest and he went after the man that stabbed him.

It hasn't been a long trial. You have paid close attention. I have observed that. And I notice [313] that you have observed the Witnesses. I don't think there is too much commentary that has to be made. The facts speak more eloquently than I can, and I rely a lot on my silent Witness. I would like to have any kind of an explanation that can vouchsafed by anybody when you go into that Jury Room and test this knife to account

for the story—the Defendant's story as to the way it happened, against what you yourself can learn from this silent Witness.

MR. WEISWASSER: (Indicating)

THE COURT: All right?

MR. WEISWASSER: All right.

THE COURT: Defense.

DEFENSE COUNSEL'S SUMMATION

MR. RUTLEDGE: Good evening, Ladies and Gentlemen of the Jury. It has been a long day.

Before making comments to you about the facts of this case, I would like to take this opportunity to thank you for participating as Jurors in this case. This is an important and difficult case. I realize that many of you made sacrifices. However, I am certain that you have done this not only to fulfill your civic duty, but to see that truth and justice are properly administered in our Courtroom. And, for this, Ladies and Gentlemen, I wish to express my sincere appreciation.

During my—the course of my discussion [314] with you, I will be analyzing and going over some of the testimony that I heard from the Witness Stand. If I make references to evidence which is in conflict with your own recollection of that evidence, I ask you to refer to your recollection rather than mine. And, I ask you not to feel that I have intentionally misquoted the testimony.

Dennis Jenkins has been charged with, on August Thirteenth, 1974, in front of the Big D Party Store, with having feloniously, deliberated, willfully, with malice aforethought, and with premeditation, kill and murder one Doyle Redding. The Defense contends that after looking at all of the evidence, that there several areas of reasonable doubt as to whether or not there has been a premeditated, deliberate, willful, malice killing.

Now we have the testimony of several Witnesses which I would like to go into. There was the testimony of Ronald Conners, and I think it is interesting that the Prosecutor brings up the record of Mr. Conners, and seems to summarily dismiss it. And then he seeks to

impugn some less credibility to the other Witnesses who had records, in this case. But in light of that, Mr. Conners testified that he was looking out the window and he saw Doyle Redding enter the store with Dennis Jenkins passing by the store, right behind Doyle Redding's entrance into the [315] store. He saw Dennis continue going east, past Van Dyke. He lost him when he past Van Dyke. Then he stated he saw him return to the area, walking west on Forest, and reach the store at about the same time Doyle Redding exited the store. And he next observed Dennis Jenkins without stopping—I think that was his words—grabbed at Doyle Redding, the deceased, and with a over the shoulder motion—if you recall, I asked him several times the type of motion which he observed the Defendant making in regards to the inflict—the infliction of the wound, and the Judge even at one time told me "That is enough"—but I kept asking him, and it was a over the shoulder—over the shoulder, came at him over the shoulder and stabbed Doyle Redding.

I submit this testimony is in direct contradiction with the testimony of the other Prosecution's Witness, Robert Gaines. Robert Gaines testified that he observed Dennis Jenkins only once, and that was when Doyle Redding was leaving the store. And he observed Dennis pass the store, and the—the store door, and he stated that he got right to the—to the west—westerly edge of the store door, stopped, and then backed up and then waited for a few seconds. And then he observed Dennis Jenkins with—and that was his testimony—with a straight forward thrust, stabbed Doyle Redding. And that was his testimony in direct [316] contradiction between the testimony of the Prosecutor's main Witness to the stabbing of this case.

And, Ladies and Gentlemen of the Jury, they have contradicted one another, and the Judge will instruct you if you believe that a Witness has been contradicted in their testimony, it is within your exclusive province to give the testimony of that Witness such credibility, if any, as you may think it deserves.

Now all I can say is I think it is rather clear—and I am not misstating the testimony—one man said it was over the shoulder motion and over the shoulder (indicating), and Mr. Gaines stated it was a straight forward thrust. And that is in direct contradiction.

Also, what is in direct contradiction is Mr. Conner saying that he didn't see him pass the door upon returning. His testimony, and I tried to be very explicit in getting the answer from him—"Did he stop along the way?"

"No, sir. I did not see him stop at the barber shop, nor at the other store."

He seemed to confront him right in front of the store with an over—over the shoulder motion, and stabbed him. And yet the Prosecutor's other Witness, Robert Gaines, states that Mr. Jenkins walked past the store, to the left, and there is a picture here (indicating) there is a [317] picture here which I want you to take to the Jury Room. And, he states that he saw him walk—and I am referring to this end (indicating)—and then walk back and wait.

Ronald Conners testimony, I submit is somewhat improbable. He states that he recognizes Dennis Jenkins when he passed by the store the first time. He said—how did he recognize him? He recognized him as one of the persons in the group that he had the night before robbed. And yet he expects you to believe that—the Prosecution expects you to believe that he said nothing or did nothing to bring anything to the attention of Doyle Redding who was in the store. And his position is such that one can almost infer that he was a lookout in the window, with his knees on the sofa looking out of the window, with the window up. And the testimony has come out that the distance between the apartment building and the store was such that it wouldn't take much of a shout—it wouldn't take much of a statement to say "Hey, he is coming."

Now the next Witness who testified, the next Witness was the doctor. He indicated there was a—one stab wound to the chest, in a slightly downward fashion. He also stated that he couldn't determine what force or what

manner the wound was inflicted. In that testimony in and if itself, though, means that the wound, which was inflicted, is [318] consistent with the Defendant's theory of the case—that the act was done in self-defense, or by accident. And I will get to that.

Let me state at this point—I should have brought it up earlier—the Prosecutor has two opportunities to talk to you. I only have one. So I may be a little bit longer. But I have to get everything out that I can, see? If there are any questions that I should have asked Witnesses on that stand, or things I should have done differently, I ask that you blame me and not my client, and not make him attributable for my mistakes I may have made in this trial.

That is the doctor's testimony. The wound that was inflicted, it can be consistent with the Defendant's theory of the case. The stabbing was done by self-defense, or by accident.

I won't go through the testimony of the Police Officers. It really doesn't add or subtract from the issue. He didn't see anything. He came afterwards and sought to preserve the knife for prints, but it was too late, as the evidence technician testified and stated too many people's hands had been on it. That is unfortunate. But that is how it came out.

I have already discussed some of the [319] testimony of Mr. Gaines. But I ask you to consider that he stated that he had been working at that store, I think, for four years. Use your own recollection. I think it was four. But, he did state he had known Mr. Redding, the deceased, for two or three years he had been coming in the store. He regarded him as a regular customer. He regarded him as a friend. He even—I am not going to make more out of it than that, but Mr. Redding had been coming into that store for two or three years. And the Judge will instruct you that you may in considering the weight to be given for testimony from any of the Witnesses, consider their relationship to any of the parties in the case.

Also, I ask you to take a look at this picture and ask yourself whether or not Mr. Gaines could really

have seen a knife in the hand of the deceased. He testified that he was on this side of the store (indicating). And I was very specific in finding out that he never left behind the counter until the stabbing had occurred and the parties ran out of the store. Did he come out of from around the counter and some outside that store? You will see a lot of obstructions in the window. I submit—I submit that it makes it somewhat possible that he couldn't have seen, because of the view that he had in the store.

Defense contends that there are several [320] areas in which there is a reasonable doubt as to whether Dennis Jenkins committed the stabbing in self-defense or by accident. I have raised a couple with you—the testimony of Mr. Conners and the testimony of Mr. Gaines, where there is direct contradiction at certain points, material points, material points because it points out did they really see what happened. Both did state there was no struggle. But on considering their statements, take in the fact that they really didn't testify as to the same facts as to what happened—as to how the stabbing, as they allegedly—allegedly say it occurred; one with an over arm motion, and the other, straight forward.

Now the Defense presented some Witnesses in this case whom, by investigation, we came up with. Now I don't want to fault the Police Officers. We had the Police Officers on the stand. He stated, yes, he went out in the area and sought to get statements. But he was unable to do so because the people were uncooperative. I think it is unfortunate that this type of uncooperation is given to the Police Department. But it is a fact, and in our office, we have an investigative staff which are very able to relate to the people of the community. Maybe, a little bit better. And they seek to bring in—Now, we sought to bring in other people besides the people that the [321] Prosecution brought in. And that was to get all of the facts about this case. Mr. Weiswasser is correct. We didn't try to hide anything. They got on the stand and said, "We did not see a knife during this." They stated, first, there was a struggle. There was a struggle in front of the store which drew some attention in from

the local residents who were there, and they came around to look.

Now I am going to refer to my notes, because I don't want to misquote any of the Witnesses.

(Indicating)

There was first the testimony of Omar Wright. Yes, he has a long record. And you can take that—the Judge will instruct you you can take into consideration in the weight you give to his testimony. Is his record any worse than Mr. Conners? And, you can't contradict what he states that he was with—living in that area. He didn't see a knife until the deceased chased Mr. Jenkins down the street. What is it? He saw a struggle. He saw a struggle which in and of itself almost precludes the Prosecution's theory, that this case—that this act was done with premeditation and deliberation and malice aforethought.

Defense contends there is no First Degree charge here. The evidence has not been supportive of such a verdict.

[322] The next two Witnesses testified to about the same—Mr. Berrien, and Mr. Cunningham—they saw a struggle and they didn't see a knife until Mr. Redding came out of the store. They did see a struggle.

And we also put on a neurologist. The importance of his testimony was to establish the fact the Defendant is left handed. Beyond a reasonable doubt, he is left handed. Both of the Prosecution's Witnesses, Mr. Gaines and Mr. Conners, stated that when he stabbed him—although they had different motions, they—but they agreed that it was with the right hand. Yet, is it plausible if they are laying in wait, and going to commit an act of revenge or whatever, to stab someone with their less weak—with their weak hand, with their less dominant hand, or would they use their strong hand?

Mr. Jenkins is left handed. Mrs. Stanton testified to that. She says she played—well, she observed him playing baseball. She didn't know too much about the ball game, but she recalled him being left handed. And the doctor's testimony was the same. I put the hypothetical to

him, the same thing that was suggested by the Prosecutor, and asked what hand would he have used. They stated it was likely and a reasonable inference could be drawn that it was done with his dominant hand. That raises another area of reasonable doubt that—a reasonable doubt that Dennis Jenkins—that this is a First Degree charge which the Prosecution would ask you to find.

Now we put Mr. Jenkins on the stand. He has no duty to testify. He could have remained right there in his chair and said, "Prove me Guilty beyond a reasonable doubt." He has no burden. We have no burden to sustain. You must—before you reach a verdict, be sure, beyond a reasonable doubt, as to each and every element of the offense as the Jury will charge—as the Judge will charge, excuse me. But Mr. Jenkins did get on the stand and he did testify. He was a little open, but he was a little nervous. But he stated what happened and what he did. And I think that the testimony of Mr. Jenkins establishes that the act was done—either in self-defense, or by accident. The accident is an excusable homicide. And the Judge will instruct you as such. It is an act done which is excused because of the situation.

Self-defense is a principle of law. It has been around as long as all of the other principles of law has been around, which establishes that a person can commit a homicide, but it can be justifiable. And the Judge will instruct you that a person can be acquitted by reason of self-defense, if, one, they were not the aggressor—and there is [324] certainly an inference that can be drawn from the testimony that Mr. Redding was the aggressor. The night before he had robbed a person who was in the company of Mr. Jenkins, and he knew that—and they had met each other that night. And maybe—maybe not for long, but long enough to establish a reasonable fear of Mr. Jenkins—in Mr. Jenkins if he ran into him. And enough to make Mr. Redding the aggressor if he ran into Mr. Jenkins. We maintain that Mr. Jenkins was not the aggressor, that he acted in good faith, under reasonable belief that his life was in danger, or that he was in risk of serious bodily injury. And third, he had no way to retreat. How could he? The man is coming at

him with a knife. You can't turn around—away from a man that has a knife. He could have had a gun. Mr. Brunner testified that on the night before one person had a knife and one had a gun. So, that in and of itself raises in Mr. Jenkins' mind when he saw him the next day, he could have had a knife, he could have had a gun. He couldn't run. It was not—it was not possible for him to retreat. He had to defend himself. Although his first action was just spontaneous—to push him away, which is the accident. And then the testimony can be characterized, "I went—oh, hey—and pushed as far—as hard as I could." That is self-defense. Knowing if he didn't, his own life was in jeopardy.

[325] I think there can be no question about that. Mr. Jenkins pulls out that knife—excuse me. The deceased pulled out that knife from his chest and chased him down the street with it. And he caught him—

There was the testimony—the testimony does establish—and we don't have to prove self-defense, or accident beyond a reasonable doubt. If in your mind, when you go into deliberate there is a reasonable doubt as to whether the act was done in self-defense, or by accident, you must acquit. You must acquit.

To make a few responses to the Prosecutor's case, he is going to speak again. But he stated that the Defendant went back for the deceased. It is probable if you are going to go looking for a person, are you going to go looking for him with a knife when there is access to guns in this city, which is unfortunate, but it is here. You are going to try. You are going to be laying in wait to kill a person with a knife? Mr. Redding owned one. Mr. Jenkins worked at a store, and with—where there probably would have been access to guns if he were so inclined.

I don't think that Mr. Gaines can really be characterized as a disinterested Witness. He lived in that neighborhood and he admitted, "Yes, there were dope [326] houses," and he knew of them. And probably felt certain compunctions in here to testify with regards to that.

And the silent Witness which Mr. Weiswasser makes so much of—

May I see the knife, please?

MR. WEISWASSER: (Indicating)

MR. RUTLEDGE: He asked, "How can one with a package in his hand open up a knife with one hand?" I think that there are a lot of ways. I know in the neighborhood I grew up in you could put a match between the blade and the handle of the knife and just enough to give it a little action on it (indicating). And, who is to say that knife wasn't already open when Mr. Redding came out of that store, that Mr. Conners was not acting as the lookout? He certainly saw—he did state through the testimony of Bonita Hicks, she said Mr. Conners told her to "Shut up. Be quiet. Something was up."

And the Prosecutor also tries to make something of the fact that Mr. Jenkins waited two weeks. He wasn't arrested. He turned himself in. He turned himself in and he came into Court. And he places his life in your hands.

I state that—that the testimony—I contend that the testimony that has been established should [327] vindicate Mr. Jenkins coming in. It establishes that there is a reasonable doubt as to whether or not the act was done by accident or in self-defense.

Thank you, very much.

THE COURT: Rebuttal.

PROSECUTOR'S REBUTTAL

MR. WEISWASSER: Ladies and Gentlemen, you have just heard The Court say "rebuttal", which means that I have the right to give what is known as a "rebuttal argument". And in all fairness, I can't bring up anything new where the Defense doesn't have a chance to answer it. And all I can just do is to answer some of the things that counsel said in his final argument. And, that is all. I can't bring out anything new.

But while counsel did have an opportunity to talk about my silent Witness, because of the very nature of the unanswerable facts, he could not really explain it to you. All he could do was to say to you when he was a little boy he remembers some knives that they used to use with a match, and so forth. Well, when you go into that Jury Room, you can test this knife anyway you want—with a match, or anything else—and see if it can be opened with one hand. Test it for yourselves. Test the Defendant's testimony. Test what he told you on the Witness Stand. Test if it is possible for it to be the way he told it to you. And, if he [328] lied, why did he lie? Why would he lie in his testimony about what the deceased did and what he did to counter. If it was not from a strong sense of guilt, the feeling that he himself knows what he did, and the reason that this is not explained to you is because it cannot be explained in the light of the testimony of the Defense. It simply cannot be explained. So all you can do is say it could be, or it may be. But when you go into that Jury Room, you check it out yourself.

When counsel tells you to look at this picture and see how it is impossible for Mr. Gaines to see what went on because of the stuff piled in the windows, and so forth, as I remember Mr. Gaines' testimony, he saw what happened at a door, not through the window. He saw the Defendant looking through the window. He saw him going by several times—several times. But the confrontation between the deceased and the Defendant occurred at the door. And it is clearly visible. It is even visible to Mr. Gaines' aunt in the back part of the store eating, where she couldn't even see it all because the deceased's body blocked it. But she was able to see at the back part of the store and Mr. Gaines was right at the front counter.

I am very interested in counsel's reference to Mr. Conners being up there in the apartment [329] across the hall—across the street looking out the window as a lookout. A lookout for what? As I understand the testimony, Doyle Redding went to the store to buy some pop and some other things there. And he carried it out in

a package. How did he and Ronald Conners know or have any way of knowing that the Defendant was going to come to that store? How did they have any idea that he would be there looking for either one of them, or even coming to that store? And, if he was a lookout in the apartment outside across the street, outside of using a rifle with a scope on it, what was he going to do as a lookout? He was going to warn the Defendant—the deceased inside the store that if he saw Redding—how was he going to communicate with him? Holler? Yell at him? Tell him that he saw him with a knife?

Yes, I agree with counsel that it is bad that people are uncooperative with the Police, that they don't tell the Police things that they saw. And, if there were Witnesses there, why did they not give the Police their names and tell what they saw?

Well, you will note that every Witness that the Defense did present allegedly as a person who saw what happened, neither waited for the Police to come, or went to the Police. They never came out of the woodwork until the trial today, as far as we knew. Why? Why, if they were [330] simply people disinterestingly telling what they saw? Why did they not go to the Police or wait for the Police to come and tell them what they saw the way Mr. Gaines did? The way his aunt did?

MR. RUTLEDGE: I would object, Your Honor, because that is incorrect. There is nothing in the testimony that—which states that Mr. Gaines and Mrs.—or the other Witness, went to the Police. That is improper.

THE COURT: That is an interpretation of the facts from which the Jury will make their determination.

MR. WEISWASSER: I think you know of your own knowledge that evidently the Police talked to Mr. Gaines and did talk to the aunt, and did talk to other people. And they did take the names that they could get, and they did get statements and they didn't get all of this information.

But, as far as these Witnesses that were presented to you, how did the Defense know who they were? They never gave their names to anybody. You remember what

I told you in my opening argument? Because I suggested to you that the Defendant had been in contact with them for two weeks before he surrendered, and discussing with them the possibility that they had seen things a certain way. And then he surrendered. And these Witnesses are presented to you as [331] being people who are testifying to you as to what they really saw.

Counsel also argues, "Is it plausible to believe that a left handed man would be lying in wait with a knife to kill somebody and hold the knife in his right hand instead of his left hand, which is the stronger hand?"

Yes, it would be plausible, if he had both hands behind his back the way Mr. Gaines said he had them. And it would depend upon in which hand he had the knife. And if you will remember the Defendant's own testimony, he said, "I pushed as hard as I could at the—Mr. Redding."

And, sure, he pushed with that strong hand on the left, but he had that knife in the right hand.

He had no way to retreat, after all, he was in a position of extreme danger and he had no way to retreat.

He could have retreated if he was afraid of this man when he first saw him in the window—through the window of the store inside the store. All he would have to do was keep going. Run. Leave. And what did he do? He waited for him to come out—this man that he was afraid of. He waited for him to come out with that knife behind his [332] back in his hand—right, left—whatever it is. It wound up in the chest of the deceased.

You know, in every criminal case, in every murder case, the Prosecutor is at a disadvantage. You see, the Defendant in every criminal case is present through every moment of the trial. He is presented to the Jury in the best possible light that can be presented of his appearance. If he does take the Witness Stand to testify, he is presented in the best possible light that he can be shown. But we cannot show you the deceased. We cannot show you Doyle Redding. We cannot let you see what kind of a person he is. Likeable, lovable, es-

sentially a decent person. We can't do that. We can't present him to let you know his version of what happened. We have to rely upon the Witnesses who can testify to what did happen.

You know, in this State, the State—the law says you cannot take the life of even a convicted murderer. We do not have capitol punishment in this State. I want to know why this man had the right to do that which the law cannot do, which the State cannot do, and which only God has a right to do.

Thank you.

THE COURT: All right.

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SUPREME COURT OF THE UNITED STATES

No. 78-6809

DENNIS SEAY JENKINS, PETITIONER,

v.

CHARLES ANDERSON, WARDEN

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 1, 1979